

First Supplement to Memorandum 2017-20

**Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Public Comment**

The following new communications are attached for the Commission<sup>1</sup> to consider:

	<i>Exhibit p.</i>
• Larry Doyle, Conference of California Bar Associations (4/11/17) . . . . .	1
• Robert Flack, Los Angeles (4/11/17) . . . . .	3
• Jeff Kichaven, Los Angeles (4/11/17) . . . . .	6
• Jeff Kichaven, <i>Calif. Nearer to Needed Mediation Reform</i> (Law360, N.Y. April 10, 2017) . . . . .	7
• Nancy Neal Yeend (4/12/17) . . . . .	14
• Richard Zitrin (4/12/17) . . . . .	15

These materials are briefly discussed below.

COMMENTS OF LARRY DOYLE ON BEHALF OF CCBA

On behalf of the Conference of California Bar Associations (“CCBA”), Larry Doyle reports that the “primary principle” advanced by CCBA’s 2011 resolution “was the protection of clients from attorneys who engage in malpractice and/or unethical conduct — including malpractice and/or unethical conduct during a mediation.”<sup>2</sup> He says that principle “transcended the language of the resolution itself, which proposed to limit any exception to California’s nearly-absolute mediation confidentiality statutes to communications between an attorney and his/her client only.”<sup>3</sup>

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Exhibit p. 1.

3. *Id.*

Thus, CCBA supports the Commission’s effort to prepare “a proposal that seeks to protect mediation clients from incompetent and duplicitous attorneys, while maintaining confidentiality to the maximum extent possible.”<sup>4</sup> CCBA apparently regards the Commission’s current draft as preferable to its own proposed language, which it says the Commission “found to be unworkable because ... it would be a one-way exception, permitting, as the majority noted in *Cassel v. Superior Court*, 51 Cal. 4th 113, ‘a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.’”<sup>5</sup> CCBA states that the objectives of the Commission’s proposal are “clearly in concert with” those of CCBA’s resolution, “though the language differs.”<sup>6</sup>

(Note: Although the Commission considered CCBA’s proposed approach and opted to pursue a different approach in its tentative recommendation, it did not make any finding about whether CCBA’s approach would be workable.)

#### COMMENTS OF ROBERT FLACK

Robert Flack submitted three new items for the Commission’s consideration:

- A document listing the number of ADR professionals in the American Arbitration Association and CalADR.<sup>7</sup>
- A document quoting a JAMS representative stating: “We have never taken a position on policy ....”<sup>8</sup>
- A document with a list of points to consider, including:
  - “*Cassel* Dicta in CONCURRING Opinion, Not even a Dissent”
  - “NO EVIDENCE of Wide Spread Abuse”
  - “Serious Negative Consequences to Relaxing Mediation Confidentiality” (with a list of some persons who have commented to that effect)
  - “Only GOTCHA Approaches Considered”
  - “Informed Consent NOT EVEN CONSIDERED — YET”<sup>9</sup>

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4. Exhibit p. 2.

5. *Id.*

6. *Id.*

7. Exhibit p. 3.

8. Exhibit p. 4.

9. Exhibit p. 5.

#### COMMENTS OF JEFF KICHAVEN

Jeff Kichaven submitted an article in which he “praises the Commission for its work to date and urges further changes to Evidence Code section 703.5.”<sup>10</sup> The article was published on Law360.com earlier this month,<sup>11</sup> and is reproduced here<sup>12</sup> with permission from that organization.

In it, Mr. Kichaven criticizes the restrictions on mediator testimony in Evidence Code Section 703.5.<sup>13</sup> He says there is a “need to amend Evidence Code Section 703.5 to help make sure that all relevant evidence is admissible so that cases are correctly decided, consumers are protected, and the rule of law promoted.”<sup>14</sup>

#### COMMENTS OF NANCY NEAL YEEND

Nancy Neal Yeend thanks the Commission for its work and says that “[c]reating an exception to confidentiality will finally untie the hands of the California State Bar,” enabling it to protect the public from legal malpractice.<sup>15</sup> She urges the Commission to “[k]eep up your good work” and “do not bend” to opponents, whom she describes unfavorably.<sup>16</sup>

#### COMMENTS OF RICHARD ZITRIN

Richard Zitrin writes that “Memorandum 2017-19 is an excellent analysis, and the statute you have suggested at pages 79-81 is, with one notable exception, a well-reasoned proposal that will have both positive practical and legal effects.”<sup>17</sup> In his view, the exception “is that by isolating only legal malpractice, you have not included exceptions for breach of fiduciary duty or actions over attorneys’ fees disputes.”<sup>18</sup> He states that “(1) actions for breach of fiduciary duty should necessarily accompany any legal malpractice claim; and (2) actions for attorneys’

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10. Exhibit p. 6.

11. See <https://www.law360.com/legalethics/articles/911656/calif-nearer-to-needed-mediation-reform>.

12. See Exhibit pp. 7-13.

13. Exhibit pp. 11-12.

14. Exhibit p. 12.

15. Exhibit p. 14.

16. *Id.*

17. Exhibit p. 15 (underscore in original).

18. *Id.* (underscore in original).

fees disputes are extremely common and often coupled with legal malpractice and breach of fiduciary duty claims.”<sup>19</sup>

He thus “strongly recommend[s]” that the Commission revise its proposed new exception as shown in underscore below:

**Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context**

SEC. \_\_\_\_. Section 1120.5 is added to the Evidence Code, to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged ~~malpractice~~. malpractice, breach of fiduciary duty, or breach with respect to attorneys’ fees or costs.<sup>20</sup>

The Commission has repeatedly discussed the types of cases in which its proposed new exception would apply.<sup>21</sup> **Does it want to change its tentative approach to that issue?**

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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19. *Id.* (underscore in original).

20. *Id.*

21. See, e.g., Minutes (Dec. 2016), pp. 5-6; Minutes (Oct. 2015), p. 5; Minutes (Aug. 2015), p. 5; Memorandum 2016-58, pp. 17-25; Memorandum 2015-45, pp. 21-25; see also Memorandum 2017-19, pp. 2-7.



*Justice Through Laws*

LARRY DOYLE, LEGISLATIVE REPRESENTATIVE  
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April 11, 2017

The Hon. Chair and Members  
California Law Revision Commission  
c/o UC Davis School of Law  
400 Mrak Hall Drive  
Davis, CA 95616

**Study K-402 – Relationship Between Mediation Confidentiality and  
Attorney Malpractice and Other Misconduct  
Comment re Memorandum 2017-20**

Dear Chairman Lee and CLRC Members and Staff:

I was very surprised to find one of the recent memoranda relating to this study, Memorandum 2017-20, dedicated to expressions of support from members of the professional mediation industry for [Resolution 10-06-2011](#) adopted by my client, the Conference of California Bar Associations (CCBA). Indeed, opponents of the CLRC study even approached the CCBA's Board of Directors and asked them to overrule my expression last meeting of support in principle for Discussion Draft #1 (see [Memorandum 2017-9 Supp. 1](#)), based on the language of this resolution. The effort was unsuccessful.

The reason the effort failed is that resolutions adopted by the CCBA are adopted "in principle." This provides the flexibility necessary for resolutions to survive in the legislative process – or, for that matter, the CLRC process. In the case of Resolution 10-06-2011, the CCBA Board agreed that the primary principle advanced by the resolution was the protection of clients from attorneys who engage in malpractice and/or unethical conduct – including malpractice and/or unethical conduct during a mediation. The Board agreed unanimously that this principle transcended the language of the resolution itself, which proposed to limit any exception to California's nearly-absolute mediation confidentiality statutes to communications between an attorney and his/her client only.

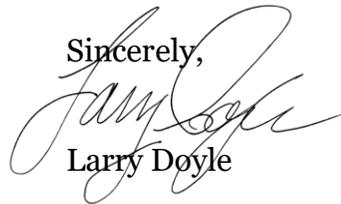
**CONFERENCE OF CALIFORNIA BAR ASSOCIATIONS**  
340 SOUTH LEMON AVENUE, #1282 • WALNUT, CALIFORNIA 91789  
EMAIL: [INFO@CALCONFERENCE.ORG](mailto:INFO@CALCONFERENCE.ORG)  
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Such a limited exception was considered early on by the CLRC in the course of this study, and found to be unworkable because, unlike Evidence Code §958,<sup>1</sup> it would be a one-way exception, permitting, as the majority noted in *Cassel v. Superior Court*, 51 Cal. 4th 113, “a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.” It is at least partly to overcome this obstacle that the commission and its staff have devoted so much time and energy to crafting a proposal that seeks to protect mediation clients from incompetent and duplicitous attorneys, while maintaining confidentiality to the maximum extent possible.

The CCBA continues to support that effort, because the objectives are clearly in concert with those of Resolution 10-06-2011, though the language differs.

Thank you again for your valuable efforts on this important issue. Please contact me at (916) 761-8959 or [Larry@LarryDoyleLaw.com](mailto:Larry@LarryDoyleLaw.com) if I can be of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Larry Doyle', is written over the typed name below.

Larry Doyle

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<sup>1</sup> 958. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.



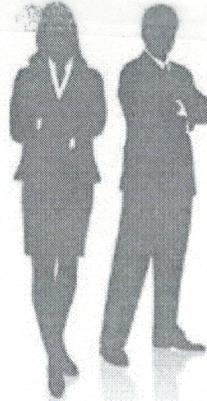
American Arbitration Association  
*Dispute Resolution Services Worldwide*

Staff Note. The documents on Exhibit pages 3-5 are from Robert Flack.

The Roster of Arbitrators  
and Mediators consists of

**6,000+**

leaders in law and industry, with dedicated  
panels for Large Cases.



**5,510+**  
up from 200

Family Law  
Consumer & PI Law  
Employment Law  
Business Law  
Clients/Users of ADR  
ADR Practitioners



## **JAMS Position on Policy**

March 1, 2016:

"We have never taken a position on policy,  
the things that you do (the Judiciary Cmte).

That's your job.

And, after sitting through the first 2 panels,  
I don't envy you."

Jay Welsh, Esq.  
Clip at 2:31:22 et seq.

# Maintaining Confidentiality in Mediation



- I. *Cassel Dicta* in a CONCURRING Opinion, Not even a Dissent
- II. NO EVIDENCE of Wide Spread Abuse
- III. Serious Negative Consequences to Relaxing Mediation Confidentiality  
Testimony From:
  - A. California Judges Association
  - B. Many Independent Judges
    - 1. Hon. Susan Finlay
    - 2. Hon. Clemens
    - 3. Hon. Cohen
    - 4. Hon. Gretchen Taylor
  - C. Judicate WEST
  - D. ARC - Alternative Resolution Centers
  - E. Family Law Community
  - F. Southern California Mediation Association
  - G. California Employment Lawyers Association
  - H. Marin County Bar
  - I. PERB
  - J. Construction Industry Representatives
  - K. CalADR
  - L. Many Independents Attorneys - See List
- IV. Only GOTCHA Approaches Considered
- V. Informed Consent NOT EVEN CONSIDERED - YET

**EMAIL FROM JEFF KICHAVEN (4/11/17)**

**Re: Article re Confidentiality and Section 703.5**

Dear Ms. Gaal:

The Commission may be interested in the attached article, which I authored and which was published on Law360.com yesterday.

The article praises the Commission for its work to date and urges further changes to Evidence Code section 703.5.

Thank you,

-Jeff Kichaven

Opinion

## Calif. Nearer To Needed Mediation Reform

Share us on:

Law360, New York (April 10, 2017, 12:52 PM EDT) --

This article informs readers of important progress being made in California to reform mediation confidentiality laws. The proposed reforms increase consumer protection and promote the rule of law, while protecting the effectiveness of mediation. This article also informs readers of one additional dimension of reform which is needed to ensure fair trials.

### Current Law and its Problems

In California, mediation is governed by the so-called “absolute confidentiality” rule of Evidence Code Section 1119, which provides:



Jeff Kichaven

Except as otherwise provided in this chapter:

- (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
  
- (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.



(c) All communications, negotiations or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

This causes problems. In particular, if a consumer feels that her lawyer committed malpractice against her in a mediation, she cannot have her claim heard on the merits. All of the evidence, oral and written, in support of her claim was “made for the purpose of, in the course of or pursuant to, a mediation” within the meaning of Evidence Code Section 1119, and is therefore inadmissible. Without admissible evidence to support her claim, no matter how righteous that claim might be, it will be dismissed without a court ever considering its merits.

Michael Cassel’s search for justice in the face of this statute reached the California Supreme Court in *Cassel v. Superior Court*, 51 Cal.4th 113 (2011). Here’s the court’s summary of what he tried to prove in a malpractice action against his (former) lawyers, in language worth quoting at length:

“A pretrial mediation of the (underlying) VDO suit began at 10 a.m. on Aug. 4, 2004. [Cassel] attended the mediation, accompanied by his assistant, Michael Paradise, and by WCCP lawyers Steve Wasserman, David Casselman and Thomas Speiss. Petitioner and his attorneys had previously agreed he would take no less than \$2 million to resolve the VDO suit by assigning his GML rights to VDO. However, after hours of mediation negotiations, petitioner was finally told VDO would pay no more than \$1.25 million. Though he felt increasingly tired, hungry and ill, his attorneys insisted he remain until the mediation was concluded, and they pressed him to accept the offer, telling him he was “greedy” to insist on more.

At one point, petitioner left to eat, rest and consult with his family, but Speiss called and told petitioner he had to come back. Upon his return, his lawyers continued to harass and coerce him to accept a \$1.25 million settlement. They threatened to abandon him at the imminently pending trial, misrepresented certain significant terms of the proposed settlement, and falsely assured him they could and would negotiate a side deal that would recoup deficits in the VDO settlement itself. They



also falsely said they would waive or discount a large portion of his \$188,000 legal bill if he accepted VDO's offer. They even insisted on accompanying him to the bathroom, where they continued to "hammer" him to settle. Finally, at midnight, after 14 hours of mediation, when he was exhausted and unable to think clearly, the attorneys presented a written draft settlement agreement and evaded his questions about its complicated terms. Seeing no way to find new counsel before trial, and believing he had no other choice, he signed the agreement."

The trial court ruled evidence of all this inadmissible, based on a "plain meaning" construction of Evidence Code Section 1119. The California Supreme Court affirmed. Cassel was left without admissible evidence to support his cause. He never got his claim heard on its merits. Was his cause just? We'll never know. An opportunity to be heard on the merits was denied him.

Justice Ming Chin was moved to write separately:

I concur in the result, but reluctantly.

The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. This is a high price to pay to preserve total confidentiality in the mediation process.

(footnote and internal reference omitted.)

Commentators noticed. I was among them ("Mediation, Confidentiality and Anarchy: The California Nightmare," Los Angeles and San Francisco Daily Journal, Feb. 17, 2011).



The California Legislature also noticed, and asked the California Law Revision Commission to study the issue and make recommendations as appropriate. It is called "Study K-402." After years of careful work, the commission may be drawing near to the time when it will conclude Study K-401 and recommend to the Legislature that it amend the California Evidence Code. The contemplated amendments will allow consumers like Cassel, who claim legal malpractice in a mediation, to introduce the evidence they need to prove their claims. Or, at least, most of that evidence. While the commission's work gets almost all the way to the cause of justice, and deserves praise for that reason, it needs to take one more step.

### **Change is Close to Being Proposed**

In its staff draft, "Tentative Recommendation, #K-402, April 2017," the commission's staff includes the text of a proposed Section 1120.5 to the California Evidence Code, which would provide in part as follows:

- (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:
  - (1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.
  - (2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:
    - (A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.



(B) A cause of action for damages against the lawyer based upon alleged malpractice.

This proposed statute, if enacted, would go a long way toward protecting consumers such as Cassel and promoting the rule of law. It would allow Cassel to have a hearing on the merits. Or, at least, most of the merits. There's one gap left which the commission should recommend that the Legislature fill.

### **One More Change is Needed**

The commission has not yet included in a tentative recommendation any proposed changes to California Evidence Code Section 703.5. If it would do so, consumers would be more completely protected and the rule of law would be more completely promoted, all without doing any harm to the efficacy of mediation. The commission should take this step.

California Evidence Code Section 703.5 provides, in pertinent part:

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.

So, under the commission's draft tentative recommendation, the Cassels of the future could testify. They could subpoena their former lawyers to testify. But they could not obtain the testimony of their mediators, even if their mediators volunteered to come forward. Their mediators are not competent to testify. This could frustrate the administration of justice in at least two situations.



First, consider the classic “he said/she said” scenario. A future Cassel testifies, truthfully, that his lawyer gave him negligent advice “X” at a mediation. His lawyer denies it. The mediator heard the advice given, and would so testify, if given the chance. For the plaintiff, this is an anxious situation. He has the burden of proof. His evidence must preponderate. While a jury might find his testimony more persuasive than that of his former lawyer, it also might not. How dearly this plaintiff wants, indeed needs, the mediator to testify. But Evidence Code Section 703.5 denies the plaintiff that proof. There’s a need to amend Evidence Code Section 703.5 to help make sure that all relevant evidence is admissible so that cases are correctly decided, consumers are protected, and the rule of law promoted.

Second, consider the situation where an opportunistic defendant throws a mediator under the bus. Assume that our future Cassel testifies that his lawyer gave him advice “X” and that the advice was negligent. The lawyer testifies that advice “X” was indeed given, and goes on to testify that the advice was not negligent, but rather was reasonable. Why? Because, in a private conversation with the mediator during the mediation, the mediator told him to give that very advice. Is this lawyer lying? Can this lawyer get away with it if he is? Maybe. Section 703.5 bars our future Cassel from calling that mediator as a witness to test the veracity of the lawyer’s defense. A future Cassel might well find justice denied as a result.

Particularly in the second situation, one would think that mediators would want, even insist on, the chance to testify and set the record straight. Otherwise, opportunistic witnesses could offer (imaginary) hearsay testimony of all sorts of foolishness attributed to mediators. This could damage a mediator’s reputation for wisdom and integrity, with the mediator defenseless to respond. Unable to testify in the proceeding in which the hearsay is offered, what is the mediator to do to protect herself and her reputation?

### **Mediation Will Continue to be Effective**

Importantly, when the California Evidence Code is amended, mediation will continue to be an effective process in California, as it is elsewhere.

In states governed by the Uniform Mediation Act, the mediation privilege gives way so that a consumer can bring a legal malpractice action against their lawyer (UMA Sec. 6(a)(6)), and all relevant evidence is admissible in those malpractice actions, even the testimony of



mediators (UMA Sec. 7(b)(2)). The UMA is the law in several jurisdictions with major urban, commercial centers, including, from west to east, Washington, Illinois, Ohio, New Jersey and Washington, D.C. There is no evidence that mediation is used less often, or less effectively, in these jurisdictions as a result.

In New York, there is even less protection of mediation confidentiality, with no evidence of adverse effects on the use or effectiveness of mediation. In New York, CPLR 4547 protects only this:

“Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages.”

There is no evidence that this minimal statutory level of confidentiality has inhibited the use of mediation, or harmed its effectiveness, in New York. Neither is there any such evidence from the federal system, which has the same minimal statutory standard of confidentiality, set forth in Rule 408 of the Federal Rules of Evidence.

It’s time to applaud the California Law Revision Commission for its work to date, which promises to move California law in the right direction, toward consumer protection and the promotion of the rule of law. The commission should continue its good work, and add to it by proposing amendments to California Evidence Code Section 703.5.

—By Jeff Kichaven, Jeff Kichaven Commercial Mediation

*[Jeff Kichaven](#) is an independent commercial mediator with a nationwide practice. He focuses on insurance, intellectual property and professional liability matters.*

April 12, 2017

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice (Study K-402)

Dear Commissioners:

Thank you and the staff for the comprehensive summary, MM-2017-19, associated with your tentative recommendation for changing the unethical protection of attorney malpractice committed during mediation. Creating an exception to confidentiality will finally untie the hands of the California State Bar, so that it can again protect the public from attorney malpractice.

It is unfortunate that there are those who oppose your efforts, and who continue to use scare tactics and factually inaccurate predictions of the future of mediation if you recommend removing the present malpractice protections. More than likely these individuals, who are reflecting a self-serving position, have never mediated in a state that has adopted the UMA or in any states that have statutes that protect the public rather than protecting attorney and mediator malpractice.

Keep up your good work, and do not bend to the regular "*glad handers*", who have no factual evidence, let alone direct experience with how other states have successfully prevented mediation malpractice abuses and without jeopardizing the integrity of the mediation process.

Sincerely,

*Nancy*

Nancy Neal Yeend

Dispute Management Strategist & Mediator



Richard Zitrin  
Lecturer in Law

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April 12, 2017

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Attn: Barbara Gaal, Chief Deputy Counsel

**BY EMAIL ONLY** c/o [bgaal@clrc.ca.gov](mailto:bgaal@clrc.ca.gov)

Dear Commissioners:

As a legal ethics professor, a trained mediator and former member of the AAA commercial mediation panel, someone who has written on this issue for some years and who has worked with the CCBA study group to follow the Commission's work on this matter, I commend the commission for its indication it will recommend a change to the statutes on mediation confidentiality to allow actions by a client against an attorney.

To this end, your Memorandum 2017-19 is an excellent analysis, and the statute you have suggested at pages 79-81 is, with one notable exception, a well-reasoned proposal that will have both positive practical and legal effects.

That exception, which I strongly urge you to modify, is that by isolating only legal malpractice, you have not included exceptions for actions for breach of fiduciary duty or actions over attorneys' fees disputes. As someone who has examined well over 1,000 attorney conduct cases and is currently a certified specialist in legal malpractice (itself a misnomer; it should be "attorney conduct"), I can tell you that: (1) actions for breach of fiduciary duty should necessarily accompany any legal malpractice claim; and (2) actions for attorneys' fees disputes are extremely common and often coupled with legal malpractice and breach of fiduciary duty claims.

Accordingly, I strongly recommend you adopt the following modification to 1120.5(a)(2)(B):

**A cause of action for damages against the lawyer based upon alleged malpractice-, breach of fiduciary duty, or breach with respect to attorneys' fees or costs.**

Clients should be protected from nefarious or even negligent attorneys with respect to private client-lawyer communications. Please close the loop by giving them full protection.

Respectfully yours,

  
Richard Zitrin

**EX 15**